Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-410

In The Supreme Court of the United States

JOHN GREEN,

Petitioner,

v.

WILLIAM GIANOS, ALBERT RYLAK, JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS AND STEPHEN RUBIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondents William Gianos, Albert Rylak, Jeffrey Martin, Law Firm of Rylak & Gianos, and Stephen Rubin, hereby submit this Brief in Opposition to the Petition for a Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

Respondents respectfully ask that this Court consider the following Counter-Statement of the Case.[1]

At the time of the subject dispute, William J. Gianos, Esq. and Albert D. Rylak, Esq. (hereinafter "Mr. Gianos" and "Mr. Rylak", respectively) were municipal prosecutors, as well as partners in a private practice, the Law Firm of Rylak & Gianos.

Mr. Gianos and Mr. Rylak's procedure for providing discovery to municipal defendants was the same as any other New Jersey municipal prosecutors they knew. *See* Petitioner's Appendix at 28A-30A. Upon receipt of a twenty-five dollar ($25.00) administrative fee, they provided defendants any permissible discovery requested. In fact, Respondents were personally aware that prosecutors in other New Jersey municipalities often charged a higher fee than they did. *Id.*

[1] The facts conferred herein were thoroughly presented to the district court and Third Circuit.

Until 2001, the New Jersey Court Rules did not address whether prosecutors could charge a fee for providing discovery in municipal cases.[2] Thus, the Rules Mr. Gianos and Mr. Rylak referred to for guidance did not suggest there was anything improper about their discovery practice. Moreover, since most municipal prosecutors are also local practicing attorneys, it is only logical the cost associated with providing a defendant discovery is going to be borne by these private attorneys. In this regard, the $25.00 discovery charge was in no way intended to place a burden on municipal defendants. Rather, it provided reimbursement for time expended and copying costs incurred by the Law Firm of Rylak & Gianos as a result of supplying discovery. *See* Pet. App. 30A-31A.

Finally, the New Jersey Appellate Division acknowledged the prevalence of administrative discovery fees in *State v. Green*, 327 N.J. Super. 334 (App. Div. 2000). The Court stated: "[W]e have a sense that the heart of the contention, the $25 administrative fee, may be the rule rather than the exception." *Id.* at 342.

After receiving a summons for traveling fifty-one (51) miles per hour in a twenty-five (25) mile per hour school zone, John Green (hereinafter "Mr. Green") requested a large quantity of discovery from Mr. Gianos. Specifically, Mr. Green requested:

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[2] Since 2001, the Comment to New Jersey Court Rule 7:7-7, citing *State v. Green*, 327 N.J. Super. 334 (App. Div. 2000), provides: "[N]o fee other than a per-page copying fee may be imposed as a condition for complying with a discovery demand . . ."

> (1) all documents Mr. Gianos intended to use to prove the speed limit had been legally set on Harrison Street (where Mr. Green was issued the speeding ticket); (2) the arresting officer's log book for the date of the incident; (3) both sides of the officer's ticket; (4) a description of the device used to measure the speed of Mr. Green's vehicle, the record of when this device was calibrated, and its maintenance and repair history; (5) the calibration slip for the tuning forks used to calibrate the radar unit; and (6) the officer's training record on the radar device.

See Respondents' Appendix at 1A-4A.[3]

Mr. Gianos informed Mr. Green that all documents relevant to the ticket would be provided upon payment of $25.00 to cover the administrative cost associated with locating, compiling and copying this voluminous discovery.

Without making a claim of insolvency, Mr. Green refused to pay this fee.

On March 12, 1997, an initial hearing regarding the speeding ticket was held in Frenchtown Municipal Court before the Honorable Jeffrey M. Martin, J.M.C. (hereinafter "Judge Martin"). Mr. Green alleged he had been denied discovery and threatened a civil suit against Mr. Gianos.

In an effort to help both parties resolve this dispute amicably, Judge Martin *suggested* photocopies of the relevant documents be made for Mr. Green at the court in

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[3] Respondents' Appendix, identified as pages 1A-35A, is annexed to the end of this Brief.

exchange for a release not to sue Mr. Gianos.[4] However, Mr. Green refused to sign a release or pay for discovery.

Moreover, even though the good faith efforts of Mr. Gianos and Judge Martin failed to resolve this dispute, at the March 12, 1997 hearing, Mr. Green was permitted to view all discovery the State intended to use in its prosecution. *See* Resp. App. 5A-7A.

Mr. Green's trial took place eighteen (18) months later on September 9, 1998. Thus, having viewed the State's evidence, Mr. Green clearly had ample time to prepare his defense. Although Mr. Green was convicted of speeding, that judgment was overturned by the New Jersey Superior Court, Appellate Division.

Nonetheless, Mr. Green subsequently filed a civil suit in federal court against Mr. Gianos, Mr. Rylak, the Law Firm of Rylak & Gianos, Judge Martin, and the Honorable Stephen B. Rubin (hereinafter, occasionally referred to collectively as "Defendants"), who at the time of the dispute was Hunterdon County Prosecutor.

In dismissing Mr. Green's civil suit on summary judgment, the district court ruled that although Mr. Green may have been somewhat limited in his access to information he deemed important, enforcement of the discovery fee by Mr. Gianos and Mr. Rylak did not deny him an opportunity to be heard. *See* Pet. App. 19A.

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[4] Petitioner's Brief misleadingly implies that Judge Martin conditioned any provision of discovery on the signing of a release. *See* Petition at 3.

The Third Circuit Court of Appeals clearly agreed with this reasoning. *See* Pet. App. 8A.

Respondents further note that Mr. Green filed a petition for panel and *en banc* rehearing, which was denied in both regards by the Third Circuit.

Instead of directly challenging the constitutional basis of these lower court holdings, Mr. Green's Petition attempts to divert this Court's attention by focusing on moot and ancillary issues: whether future municipal defendants will be denied a fair trial; the amount of additional guidance a *pro se* litigant should be afforded when responding to a summary judgment motion; and whether discovery ended too soon.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I.

SINCE THE LOWER COURTS' RULINGS WERE IN ACCORD WITH PRECEDENT ESTABLISHED BY THIS COURT IN *SIEGERT V. GILLEY*, 500 U.S. 226 (1991), REVIEW IS NOT WARRANTED.

This Court has unequivocally determined the framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gomez v. Toledo*, 446 U.S. 635 (1980).

In this regard, *Harlow* held: "On summary judgment, the judge appropriately may determine, not only the

currently applicable law, but whether that law was clearly established at the time an action occurred . . ." *Id.* at 818.

Referring to the holding in *Harlow*, this Court later added in *Siegert v. Gilley*, 500 U.S. 226 (1991):

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of *whether the plaintiff has asserted a violation of a constitutional right at all.*
>
> Decision of this *purely legal question* permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.
>
> One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long, drawn-out lawsuit. (emphasis added)

Id. at 232.

It is clear in the case at bar that both the district court and the Third Circuit determined Mr. Green did not establish a violation of a constitutional right.

Before addressing Defendants' summary judgment argument concerning qualified immunity, the district court held:

> [T]he Court *declines to find that the enforcement of the twenty-five dollar fee amounts to a constitutional violation.* (emphasis added)

See Pet. App. 19A. The district court's reasoning in this regard was that Defendants' insistence on the fee did not "so infect the proceedings with unfairness" as to violate the basic tenants of due process. Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court concluded that although Plaintiff was somewhat limited in his access to discovery he may have personally deemed important, enforcement of the $25.00 discovery fee did not deny plaintiff the opportunity to be heard in a "meaningful manner".

The Third Circuit's opinion also cited *Mathews*, and settled:

> We agree with the District Court that, although [Plaintiff] was somewhat limited in his access to information he believed was relevant to his defense of the speeding ticket, the refusal to provide copies at a reasonable cost of all items requested in discovery did not deny him the opportunity to be heard in a meaningful manner. This possible violation of the state court rules of discovery *does not amount to a federal constitutional violation*. (emphasis added)

See Pet. App. 8A.

Petitioner contends the district court and Third Circuit inappropriately relied on *Mathews*.

In *Mathews*, this Court held that due process is a concept which is not unrelated to time, place and circumstances, and thus established a balancing test to determine whether procedural due process requirements have been satisfied. *Id.* at 334-335.

Petitioner argues this balancing test was only intended to be used in an administrative law context, not a

criminal context, which he alleges was the nature of the speeding charge against him. He therefore reasons that the lower courts were incorrect to have applied the *Mathews* balancing test.

First, it is clear that neither the district court nor the Third Circuit applied, or even cited, *Mathews*' balancing test. They merely alluded to *Mathews* for the proposition that "the fundamental requirement of due process is the opportunity to be heard . . . in a meaningful manner." *Id.* at 333; Pet. App. 8A,19A.

Furthermore, contrary to Mr. Green's assertion, under New Jersey law traffic violations are only "quasi-criminal" in nature. *See State v. Zucconi*, 93 N.J. Super. 380, 388-392 (App. Div. 1967) (holding that Miranda rules with respect to implementation of rights to counsel and against self-incrimination did not apply in "quasi-criminal" traffic offense context).

Petitioner also contends the lower courts' rulings that a possible violation of state discovery rules does not amount to a federal constitutional violation conflicts with a Ninth Circuit holding.

In this regard, Petitioner cites *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992) for the proposition that "a policy itself need only cause a constitutional violation; it need not be unconstitutional *per se*." *Id.* at 654. However, beyond citing this language, Petitioner offers no elaboration on how the lower court decisions in the present case conflict with *Jackson*.

In fact, it is evident that the cited language does not illustrate a conflict. The crux of this quotation is that a policy may cause a constitutional violation without the

policy itself being *per se* unconstitutional. The district court's ruling, which the Third Circuit unequivocally affirmed, was that Defendants' actions in demanding a $25.00 discovery fee *did not cause a constitutional violation*.

Accordingly, Respondents respectfully submit that this case does not merit Supreme Court review.

II.

PETITIONER'S FIRST ARGUMENT WHY THIS COURT SHOULD GRANT CERTIORARI IS ENTIRELY WITHOUT MERIT.

In a transparent attempt to grab this Court's attention, Petitioner argues that his case occasions an issue of "great public importance". *See* Pet. 8.

In this regard, Petitioner avers that without this Court's intervention, municipal prosecutors will continue to impose administrative discovery fees, and that these fees will vary among municipalities depending on the prosecutors' personal motives.

As explained in Point A, *infra*, this contention is moot.

Moreover, the record below clearly illustrates that Mr. Gianos and Mr. Rylak did not demand a $25.00 fee from Mr. Green in order to further a personal interest. Rather, this charge was to cover the anticipated administrative expenses to their private firm associated with providing Mr. Green's discovery.

Mr. Gianos and Mr. Rylak's reasonable belief that their demand was appropriate, as demonstrated by the record below, supports the district court's decision concerning qualified immunity.

Finally, Petitioner has failed to present a legitimate argument that the district court's decision in this regard conflicted with applicable precedent.

A. Petitioner's Claim That, Absent This Court's Intervention, Municipal Prosecutors Will Deny Future Defendants the Right to a Fair Trial and Equal Protection, is Moot Since the Current New Jersey Court Rules Expressly Address the Imposition of Discovery Fees in Municipal Matters.

Petitioner misleadingly contends:

> This [C]ourt should grant this petition for certiorari [sic] this is a matter of great public importance... If this decision stands it would mean that we continue with municipal prosecutors setting fees at whatever they want, fees that they have a personal interest in, because it goes into their private pockets. The fees would vary from town to town, depending on what town you were charged in, and the lifestyle the prosecutor wanted to maintain.

See Pet. 8.

Referral to the 2002 and 2003 New Jersey Court Rules demonstrates that Petitioner's argument in this regard is moot.

The Comment to New Jersey Court Rule 7:7-7 states: "[N]o fee other than a per-page copying fee may be

imposed as a condition for complying with a discovery demand . . ."[5]

Therefore, Petitioner is arguing an issue which has already been addressed, and thus preempted, by the New Jersey Supreme Court and Administrative Office of the Courts of New Jersey.[6] By providing that only a per-page copying fee may be charged for discovery in municipal cases, the current New Jersey Court Rules expressly prohibit municipal prosecutors from charging any fee they wish.

Accordingly, Respondents respectfully submit that this issue is moot and does not merit Supreme Court review.

B. The Record Below Clearly Demonstrates That Mr. Gianos and Mr. Rylak Did Not Demand an Administrative Discovery Fee in Order to Further a Personal Interest.

Petitioner claims Mr. Gianos and Mr. Rylak demanded a $25.00 discovery fee in order to raise money for their private law firm.

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[5] As will be discussed more fully in Point B, *infra*, the Comment to this Rule does not impact Defendants' entitlement to qualified immunity because Plaintiff's dispute arose in 1997 and his speeding trial was in 1998. Both the 1997 and 1998 Comments pertaining to municipal discovery make no mention of discovery fees. It is undisputed that Mr. Gianos and Mr. Rylak were, at all relevant times, guided by the 1997 and 1998 New Jersey Court Rules.

[6] These are the entities responsible for formulation and approval of the New Jersey Court Rules.

Although the New Jersey Court Rules applicable at the time of the dispute did not expressly authorize charging a fee for discovery, they did not expressly prohibit this charge either. In fact, the Rules made no mention of discovery fees in municipal cases. *See* 1997 and 1998 New Jersey Court Rules.

Moreover, the record below clearly illustrates that Mr. Gianos and Mr. Rylak had personal knowledge that prosecutors in numerous other New Jersey municipalities engaged in the same practice, and often set their fixed charge at a higher rate.

In this regard, Mr. Gianos and Mr. Rylak each certified the following in affidavits that were submitted in support of Defendants' summary judgment motion in district court:

> Based on my understanding that some years ago the New Jersey Supreme Court determined all discovery would be handled through the Prosecutor's Office, I adopted the process utilized by every prosecutor I know, which is to charge for discovery.
>
> Moreover, I adopted this procedure with the knowledge that I must provide discovery in accordance with New Jersey Court Rules, and that such Rules did not [at the time] expressly prohibit charging a discovery fee.
>
> The fee I charged for the provision of discovery was a flat administrative fee of twenty-five dollars ($25.00). I have always considered this a fair fee since I am personally aware prosecutors for

> the following New Jersey municipalities charge a higher amount: (14 municipalities are listed).

See Pet. App. 28A-30A.

Additionally, these affidavits explained that since most municipal prosecutors are also local practicing attorneys, absent reimbursement for the expenses of providing discovery, such costs would have to be borne by these attorneys and their firms. *See* Pet. App. 30A.

Unlike attorneys from the County Prosecutor's Office, a municipal prosecutor is not appointed a secretarial staff to handle discovery requests. As a result, this administrative work is usually performed by secretaries from the prosecutor's own practice. *Id.*

Finally, these private law firms often bear the additional financial burden of having to pay local police departments for their copying costs and the like.[7] *Id.*

Respondents would also like to address the Supreme Court case Petitioner cites as precedent that a constitutional issue is raised when a prosecutor has a personal interest in litigation before him.

In this regard, Petitioner cites *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) for the proposition that "[a]

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[7] Plaintiff asked for discovery items that, while not unusual or necessarily unfair requests, were in the possession of the police department. These items included, but were not limited to, the arresting officer's log book for the date Plaintiff was issued a speeding summons, and the officer's training record on the radar device. It is likely procurement of this discovery would have cost Mr. Gianos and Mr. Rylaks' private law firm both time and money.

scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision *and in some contexts* raise serious constitutional questions." (emphasis added) *Id.* at 249-250.

In *Marshall*, an employer brought a federal action challenging a provision of the Fair Labor Standards Act that provided money collected as civil penalties for employment of child labor was to be returned to the Department of Labor to reimburse the cost of investigating the violation.

This case, while seemingly analogous to the case at bar in that it involved reimbursement of a prosecutorial entity for the procedural aspects of its work, is clearly distinguishable in a crucial respect.

The plaintiff claimed the Fair Labor Standard Act's reimbursement provision created an impermissible risk of bias because a greater effort by a regional Department of Labor office to uncover violations would increase the amount of penalties assessed, thus increasing the reimbursements for that office. *Id.* at 238.

However, this Court stated:

> . . . we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote. No government official stands to profit economically from vigorous enforcement of the [procedure at issue].

Id. at 250.

In the case at bar, the potential for bias clearly was even more remote. As explained, the diminutive fee Mr. Gianos and Mr. Rylak received for providing discovery was reimbursement for the necessary administrative costs incurred by their private law firm.

It is axiomatic that receipt of $25.00 for this purpose would not have prompted Mr. Gianos and Mr. Rylak to increase their prosecutorial efforts. They only prosecute those individuals issued a summons by a police officer in a municipality they serve.

In this regard, Mr. Gianos and Mr. Rylak have no connection to, or influence upon, a police officer's decision to issue a summons. They are simply forwarded a copy of the summons once it has been issued. It is the police officer who has the discretion whether or not to issue a particular summons.

Therefore, there is not even arguably an appearance of impropriety raised by their discovery procedure.

Accordingly, Respondents respectfully submit that this Court's review is not warranted.

C. Petitioner Has Failed to Present a Legitimate Argument That the District Court's Decision Concerning Qualified Immunity Conflicted With Applicable Precedent.

Petitioner's sole argument challenging the district court's qualified immunity holding is that the Third Circuit did not address the issue. According to Petitioner, the Third Circuit's decision in this regard reveals that it disagreed with the district court.

This argument is not only disingenuous, it is misleading. A full reading of the Third Circuit's opinion leaves no doubt that the Court chose not to discuss qualified immunity because it was an unnecessary step in its analysis.

As discussed in Point I, *supra*, the Third Circuit agreed with the district court that the possible violation of state court rules of discovery in this matter does not amount to a federal constitutional violation.

Pursuant to Supreme Court precedent, this legal finding ended the inquiry and entitled Defendants to judgment as a matter of law. *See Siegert*, 500 U.S. at 232.

Thus, Petitioner's assumption that the Third Circuit's silence demonstrated disagreement with the district court's holding is without merit.

Furthermore, this assumption highlights Petitioner's failure to present a legitimate argument that the district court's decision concerning immunity conflicts with valid precedent.

The district court in fact supported its qualified immunity decision with unequivocal Supreme Court precedent. It cited *Anderson v. Creighton*, 483 U.S. 635 (1987) for the principle that qualified immunity is available if "a reasonable [official] would have believed [his or her] actions to be lawful, in light of the clearly established law and the information the . . . [official] possessed." *Id.* at 641.

The district court found that "there appears to be no law prior to this incident even suggesting that [an administrative discovery] fee was improper, much less clearly establishing the impropriety of such a fee." *See* Pet. App. 20A.

The court did not end its inquiry here. It examined the subjective element of qualified immunity as mandated by *Gomez v. Toledo*, 446 U.S. 635 (1980). This Court held in *Gomez* that the qualified immunity "test focuses not only on whether the official has an objectively reasonable basis for [his] belief, but also whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right. . . . '" *Id.* at 641 (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975)).

In this regard, the district court determined that Mr. Gianos and Mr. Rylak's knowledge of the prevalence of fixed discovery fees in other New Jersey municipalities "suggests [they] believed the administrative fee was proper." *See* Pet. App. 20A.

The district court's findings on this issue are entirely consistent with the record below. *See* Pet. App. 28A-31A; and footnote 5.

Accordingly, Respondents respectfully submit that this case does not merit review.

III.

PETITIONER'S ARGUMENT THAT THE DISTRICT COURT FAILED TO INSTRUCT HIM ON THE PROCEDURE FOR ANSWERING DEFENDANTS' SUMMARY JUDGMENT MOTION IS WITHOUT MERIT.

Petitioner claims various other Circuits have ruled that *pro se* litigants should be provided extra guidance by a district court when served with an adversary's summary judgment motion.

In this regard, essentially two arguments are presented.

First, Petitioner alleges he was not informed that his summary judgment opposition brief needed to address his emotional distress claim, in light of the fact that Defendants' moving brief did not do so.

Second, Petitioner contends Respondents did not request dismissal of any State actions in their motion, and thus he again was unaware he had to address the same.

At the outset, Petitioner does not provide any evidence that the Third Circuit has ruled *pro se* litigants should be given special guidance by a district court on summary judgment procedure.

More importantly, concerning the first issue, Respondents' district court summary judgment motion requested dismissal, with prejudice, of "any and all claims made by Plaintiff." Thus, Petitioner was provided with clear notice that Defendants' motion was challenging all his claims.

Moreover, the district court afforded Petitioner additional time to submit his summary judgment opposition after he complained to the judge in writing that he was not sure he completely understood Federal Rule of Civil Procedure 56. *See* Resp. App. 8A-9A.

Finally, Petitioner's second argument is untrue. Defendants' brief in fact called for dismissal of Mr. Green's action based upon two different State grounds.

First, Defendants argued that in addition to qualified immunity under federal law, they were afforded immunity by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, *et seq.*

Second, Defendants argued that Mr. Green had not made the factual showing required to support his malicious prosecution claim. *See* Resp. App. 26A-27A, 30A-32A. In fact, Mr. Green's summary judgment opposition responded to this argument at length.

Accordingly, Respondents respectfully submit that this case does not merit review.

IV.

HARLOW V. FITZGERALD, 457 U.S. 800 (1982) CLEARLY ILLUSTRATES DISCOVERY WAS NOT STOPPED TOO SOON.

Petitioner challenges the Third Circuit's holding that he was not entitled to discovery in this federal action because his complaint could have been dismissed for failure to state a claim.

In this regard, Petitioner claims that discovery he was seeking to compel at the time his case was dismissed by the district court would have provided evidence of official abuse that goes to the heart of 42 U.S.C. § 1983.

Petitioner cites *Monroe v. Pape*, 365 U.S. 167 (1961), in which this Court stated that 42 U.S.C. § 1983 was meant to provide a remedy to individuals deprived of a constitutional right by a government official's abuse of his position. *Id.* at 172.

As discussed in Point I, *supra*, both the district court and Third Circuit clearly ruled there was no constitutional violation.

Respondents also noted earlier in this Brief that *Harlow* held: on a summary judgment motion in which the

defendant has invoked qualified immunity, the judge may appropriately determine not only the applicable law, but whether that law was clearly established at the time of the alleged violation. *See Harlow*, 457 U.S. at 818.

Importantly, enunciation of this principle was followed by the explicit pronouncement:

> Until this threshold immunity question is resolved, *discovery should not be allowed*. (emphasis added)

Id.

Therefore, since pursuant to Supreme Court precedent Mr. Green was not entitled to continue discovery, Respondents respectfully submit that this case does not warrant review.

CONCLUSION

For all the foregoing reasons, Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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DATED: October, 2002

APPENDIX

John P. Green
69 Duclos Lane
Edison NJ 08817
Pro-Se
908-572-6273

Town of Frenchtown

Plaintiffs, Summons and Complaint No. B 3284

Vs.

John Green

Defendants.

REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

The Defendant, John Green, request pursuant to rules of the New Jersey Rule's Governing the courts. Please forward the documents and tangible things within 30 days after service of this request to John Green 69 Duclos Lane Edison NJ 08817.

DEFINITIONS AND INSTRUCTIONS

The term "documents" as used in this request is defined to include without limitation all original and non-identical copies of accounts, acknowledgments, advertisements, affidavits, agreements, appointment books, bills, bills of sale, calendars, charges, checks, client list, computer printouts, computer readable disks, contracts, correspondence, customer call records, customer lists, diaries, descriptions, drafts, files, income statements, insurance policies, insurance records and reports, inventories, invoices, journals, ledgers, letters, licenses, log books,

loose-leaf binders, messages, newspapers, notices, notes, orders, papers, photographs, policies, receipts, reports, Rolex cards, statements, tangible things, tape recordings, tax returns, telephone bills, telephone lists and logs, warranties, work orders and sheets, wrappers and writings.

The words "you" or "your" as used in this request shall be construed to mean any of the following: Town of Frenchtown, or any employee, agent or representative within the control of town of Frenchtown.

You shall produce original copies of all requested documents and copies thereof that bear any mark or notation not present on the original. In all cases where originals pr non-identical copies are not available, "document" or "documents" also mean identical copies of original documents and non-identical copies thereof.

The term "relates to" shall mean consist of, refer to, reflect or be in any way logically or factually connected with the matter discussed.

If you withhold any information on the ground that you contend it is privileged or otherwise protected from disclosure, state specifically the legal basis for withholding, state all facts which support your withholding; identify all persons receiving or having knowledge of any of the information; and identify all documents containing any of the information. If a claim of privilege is asserted with respect to any document, provide the above information, as well as: (a) author; (b) addressee; (c) distribute; (d) date; (c) type of document; (f) topic; (g) grounds and factual basic for assertion of privilege.

If any document described in any paragraph of this request for documents is no longer in your possession, custody or control, state whether it: (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) has been disposed of through other means. In each instance, explain the circumstances surrounding such disposition, and identify the person directing or authorizing same, and the date thereof.

REQUEST

1. All documents or things relating to the establishment of the speed limit on Harrison St., time and date of town meeting to set limit, newspaper ads to inform public of the town meet, notice in newspapers of the establishment of sped limit on Harrison St., all documents that you intend to use to prove that the speed limit on Harrison St. Was legally set.

2. Copies of the arresting officers log books for his shift on Jan. 14, 1997.

3. Copies of Both sides of the arresting officer's copy of the tickets.

4. A description of the device used to measure my speed when it's was Calibrated and how, and it's maintenance and repair history.

5. Copy of Calibration slip for tuning forks use daily to Calibrate radar unit in the three speeds.

6. Copy of the Calibration of the police car's speedometer.

7. The officer's training records on that device, and his employment history.

DATED Jan 19 1997

John Green

JOINT COURT OF MILFORD
FRENCHTOWN, NEW JERSEY
HUNTERDON COUNTY

STATE OF NEW JERSEY	)	TRANSCRIPT
VS.	)	OF
JOHN P. GREEN	)	HEARING

PLACE: FRENCHTOWN MUNICIPAL BUILDING.

DATE: MARCH 12, 1997

BEFORE:

HONORABLE JEFFREY MARTIN, J.M.C.

TRANSCRIPT ORDERED BY: JOHN P. GREEN

APPEARANCES:

FOR THE STATE: WILLIAM GIANOS, ESQ.

FOR THE DEFENDANT: PRO SE

PRINTED WORDS
EMMA STORR CLOWES, CCT
123 PETTICOAT LANE
LEBANON, NEW JERSEY 08833

[20] I don't know what the ordinance or the thing with the county is setting the speed limit. I have not, I can't do no research without the proof (sic) I asked for. Give me the information, I'll pay for it, like I did in a letter to him.

THE COURT: Even though you objected, if there's a release here, do you object to doing it my way?

MR. GIANOS: No, Your Honor.

THE COURT: Okay. All right. So –

MR. GIANOS: But Your Honor, I want it on the record to state that we have present in court today everything that we will rely on to prosecute this case.

There's nothing additional that we are going to rely on to prosecute this case, other than what is sitting on the table to the right of me right now.

THE COURT: Okay.

MR. GIANOS: That's –

THE COURT: And that's what you're basically entitled to, sir. You're not entitled to what we call a fishing expedition for what they don't rely on.

JOHN P. GREEN: Well they rely –

THE COURT: Sir, if they fall short in what they say they need to prove their case –

JOHN P. GREEN: Right.

THE COURT: – then they fall short and they lose. But they don't have to supply what they say they don't need.

* * *

[23] I'm going to play this, rather than trying that, then I'll play it by the book too. Which is not to say – okay prosecutor, even though he's not happy with me – let's forget going through your office, let's just make the copies give the man his copies and set this case up for trial.

You don't want to do that?

JOHN P. GREEN: I'm happy to do that.

THE COURT: No, no sir. You're happy your way but not happy for the trade off.

JOHN P. GREEN: I am not –

THE COURT: I'm only happy with what I get, not with what I have to give.

JOHN P. GREEN: I –I won't sign a release.

THE COURT: Okay. Then you will not sign a release, then I'm not going to order it be done.

I'm going to reschedule this for trial. I will point out to you sir, that you've now – so that you're clear with what I'm saying – when you come back next time and you're still in this (inaudible), okay, I'm reminding you of two things – it was made available to you here in court and you've seen it and you could have had it by simply saying – I'll forget this thing about law suits – and I would have made you a copy.

JOHN P. GREEN: That is –

THE COURT: In my mind you've been given every opportunity for your discovery at this point. I'm going to give

* * *

John Green
69 Duclos Lane
Edison NJ 08817
732-572-6273
PRO-SE

April 5, 2001

Honorable Anne E. Thompson
United States Magistrate Judge
United States District Court (Filed Apr. 10, 2001)
Clarkson S. Fisher Federal Building &
Federal Courthouse
402 E. State Street
Trenton NJ 08608

Re: Green vs. Gianos, et als
Docket No.: CV-00-1959(AET)

[So Ordered Anne E. Thompson 4/9/01]

Dear Judge Thompson:

Thank you for your letter of April 3, 2001. I do ask for an adjournment to May 7, 2001 for a few reasons.

I did not receive the defendant's motion until March 26, 2001, by First Class Mail. I was a little confused about Federal Civil Rule 56(c), "The adverse party prior to the day of hearing may serve opposing affidavits." I mistakenly took this to mean any day.

Since I did receive this motion until late on March 26, 2001, and being a pro-se and not totally understanding Rule 56(c), I ask that I be given until April 30th 2001 to file my affidavit and brief.

I might also note that I have talked to Mr. Rotolo office on March 26, 2001 concerning the missing pages and mixed up affidavit in his appendix. I also faxed Mr. Rotolo today

a letter asking if he was going to correct his appendix or not. Depending what he does may change my brief.

On December 21, 2000, the defendants applied for an Extension of time to complete discovery, I did not oppose this and Judge Wolfson on January 16, 2001, granted their request. This is the first adjournment or extension that I have asked for.

I certify that I am fully familiar with the facts of this matter and that the statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully yours,

/s/ John Green
John Green
CC: Mr. Victor A. Rotolo by fax April 5, 2001

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WILLIAM GIANOS, ALBERT RYLAK, HONORABLE JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS and HONORABLE STEPHEN RUBIN

Plaintiff(s), JOHN GREEN vs. Defendant(s), WILLIAM GIANOS, ALBERT RYLAK, JEFFREY MARTIN, LAW FIRM OF RYLAK & GIANOS AND STEPHEN RUBIN.	**UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY** **Civil Action No. 001959(AET)**

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

OF COUNSEL AND ON THE BRIEF:

Victor A. Rotolo, Esq.

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PRELIMINARY STATEMENT

Plaintiff's suit must fail because the crux of his claim revolves around the alleged inappropriateness of an administrative fee for discovery in municipal cases, when in fact, the imposition of such a fee is common practice among municipal prosecutors in New Jersey.

This case arises out of Plaintiff's refusal to pay an administrative fee to the Frenchtown, New Jersey Municipal Prosecutor for discovery concerning a speeding ticket he chose to contest.

After receiving a summons for traveling fifty-one (51) miles per hour in a twenty-five (25) mile per hour school zone, Plaintiff requested a large quantity of discovery from Mr. Gianos, Frenchtown Municipal Prosecutor. Specifically, Plaintiff requested:

> **(1) all documents Mr. Gianos intended to use to prove the speed limit had been legally set on Harrison Street (where Plaintiff had been issued the speeding ticket); (2) the arresting officer's log book for January 14, 1997; (3) both sides of the officer's ticket; (4) a description of the device used to measure Plaintiff's speed, when it was calibrated, and the maintenance and repair history; (5) the calibrations slip for the tuning forks used to calibrate the radar unit; and (6) the officer's training record on the radar device.** *See* Exhibit C.

Mr. Gianos informed Plaintiff all documents relevant to the ticket would be provided upon receipt of twenty-five dollars ($25.00) to cover the administrative cost associated with locating, compiling and copying this discovery.

Despite the volume of the request and the fact that charging such a diminutive flat fee for discovery is a common practice among municipal prosecutors in New Jersey, Plaintiff refused to pay.

On March 12, 1997, an initial hearing regarding the speeding ticket was held in Frenchtown Municipal Court before Judge Martin. Plaintiff alleged he had been denied discovery and threatened suit against Mr. Gianos.

In an effort to help both parties resolve this dispute amicably, Judge Martin suggested copies of the discovery documents be made for Plaintiff at the Court in exchange for a Release not to sue Mr. Gianos. However, Plaintiff refused to sign a release or pay for discovery.

Significantly, even though the good faith efforts of Mr. Gianos and Judge Martin failed to resolve this matter, Plaintiff did view all relevant discovery at the March 12, 1997 hearing.

The trial for Plaintiff's speeding ticket ultimately took place eighteen months later on September 9, 1999, at which time he was convicted of this offense. Thus, having viewed the State's evidence, Plaintiff had ample time to prepare his defense.

Plaintiff appealed this Municipal Court conviction to New Jersey Superior Court, Law Division, where it was defended by the Hunterdon County Prosecutor's Office. On *de novo* review, the Law Division affirmed the guilty finding.

On January 19, 2000, the Appellate Division overturned Plaintiff's speeding conviction because the State had not proven every element of the speeding offense beyond a reasonable doubt.

The Appellate Division briefly addressed the discovery fee dispute, but opted not to make any affirmative rulings on the issue. However, significantly, the Court expressly acknowledged the practice of charging an administrative discovery fee by stating:

> **[W]e have a sense that the heart of [Defendant's] contention, the $25.00 administrative fee, may be the rule rather than the exception.** *See* Exhibit G at page 342.

On April 25, 2000, Plaintiff filed a Complaint in Federal District Court alleging he had been deprived of his due process rights by Mr. Gianos, Mr. Rylak, Judge Martin, the Law Firm of Rylak and Gianos, and Mr. Rubin, the Hunterdon County Prosecutor.

For the following reasons, Defendants are entitled to judgment as a matter of law and Plaintiff's Complaint should, respectfully, be dismissed with prejudice:

(1) Plaintiff was not deprived of his due process rights because he viewed the discovery made available to him in accordance with New Jersey Court Rules;

(2) Mr. Gianos, Mr. Rylak, and Mr. Rubin are entitled to the affirmative defense of qualified immunity under Federal and State law because their actions were objectively reasonable and performed with subjective good faith;

(3) Judge Martin is entitled to absolute judicial immunity from liability for his alleged actions and/or inactions;

(4) Plaintiff's claim against Mr. Gianos and Mr. Rylak for malicious prosecution fails because he cannot

make a factual showing which supports his bare allegation these Defendants acted with malice; and

(5) since Mr. Gianos and Mr. Rylak are not liable for their alleged wrongful actions, the Law Firm of Rylak & Gianos, as a partnership, cannot be held liable.

STATEMENT OF FACTS

The material facts underlying Defendants' Motion for Summary Judgment are fully set forth in Defendants' attached Statement of Undisputed Facts submitted pursuant to Local Federal Practice Rule 56.1. For the sake of brevity, these facts will not be reiterated herein, but are incorporated and adopted by reference.

LEGAL ARGUMENT

POINT I

PLAINTIFF WAS PROVIDED DISCOVERY IN ACCORDANCE WITH NEW JERSEY COURT RULES AND THUS NOT DEPRIVED OF HIS DUE PROCESS RIGHTS.

In January, 1997, Mr. Gianos informed Plaintiff copies of all relevant discovery would be provided upon payment of a twenty-five dollar fee. Plaintiff refused to pay this fee.

Nevertheless, at the March 12, 1997 initial hearing, Mr. Gianos offered Plaintiff an opportunity to review this discovery.

In addition, Judge Martin, in a good faith effort to aid the parties in their discovery dispute, suggested copies be

made for Plaintiff in return for a signed Release promising not to sue Mr. Gianos.

Even though Judge Martin's suggestion was declined, Plaintiff did view the relevant discovery that was made available to him in accordance with New Jersey Court Rule 7:7-7(b).

New Jersey Court Rule 7:7-7(b) governs municipal practice and provides a defendant "shall be allowed to inspect, copy and photograph *or* be provided with copies and any relevant reports . . . within the custody of the prosecuting attorney." *R.* 7:7-7(b). (emphasis added)

Accordingly, it cannot be disputed that the mandate of Rule 7:7-7(b) was adhered to in this matter.

Furthermore, discovery relevant to a municipal prosecution will be in the possession of municipal prosecutors, who are almost always local practicing attorneys. Therefore, it is only logical the cost associated with providing this discovery is going to be borne by these private attorneys.

Moreover, there is no provision in the New Jersey Court Rules that directly addresses the imposition of discovery fees.[1] Thus, under applicable New Jersey Court

[1] Although the 2001 comments to New Jersey Court Rule 7:7-7 reference charging a per-page copying fee for discovery in municipal cases. Plaintiff's dispute arose in 1997 and his speeding trial was in 1998. Both the 1997 and 1998 comments pertaining to municipal discovery make no mention of discovery fees. Mr. Gianos and Mr. Rylak were, at all relevant times, guided by the 1997 and 1998 New Jersey Court Rules. Moreover, since the Appellate Division in *State v. Green* failed to make any affirmative rulings in regard to discovery fees, it

(Continued on following page)

Rules there was nothing improper about the Prosecutors' fee request.

Plaintiff was initially informed he could have copies of all discovery upon payment of the twenty-five dollar administrative fee. Plaintiff refused and never made any claim on insolvency. Plaintiff was then given an opportunity to copy all discovery at the March 12, 1997 hearing before Judge Martin. Plaintiff again refused.

Finally, Plaintiff was allowed to view all of the materials, which he did, at this hearing. Therefore, there can be no doubt Plaintiff was permitted ample opportunity to review the discovery as required by New Jersey Court Rule 7:7-7(b).

Moreover, the trial for Plaintiff's case was not heard until September 9, 1998, more than eighteen months after Plaintiff was permitted to view the discovery on March 12, 1997. This provided Plaintiff substantial time to prepare his defense.

Due process in its constitutional sense is little more than another name for fair play. *See State v. Langella*, 144 N.J.Super. 268, 284 (App. Div. 1976).

Due process connotes fundamental fairness. It is an element which, when missing, produces the reaction accorded to that which is "shocking to the universal sense of justice". *See id.* (citing *United States v. Russell*, 411 U.S. 423, 432 (1973)).

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appears the 2001 comments, which cite to the Appellate Division case, inaccurately rely on this case.

The actions of Defendants did not violate Plaintiff's right to fundamental fairness because Plaintiff ultimately viewed the discovery concerning the charges against him. After viewing this discovery, he had over a year and a half to consider and prepare a defense to the State's case.

Moreover, charging a diminutive fee that is commonly charged throughout the State cannot be considered "shocking to the universal sense of justice".

Plaintiff was clearly provided discovery in accordance with New Jersey procedural law and not deprived of his due process rights.

Accordingly, the crux of Plaintiff's case, i.e., that his due process rights were violated because discovery was not provided, cannot be proven and his Complaint should, respectfully, be dismissed.

POINT II

MR. GIANOS, MR. RYLAK AND MR. RUBIN ARE ENTITLED TO THE AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY UNDER BOTH FEDERAL AND STATE LAW BECAUSE THEIR ACTIONS WERE BOTH OBJECTIVELY AND SUBJECTIVELY REASONABLE.

A. FEDERAL LAW

In the subject litigation, Plaintiff claims his due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated by Defendants' alleged failure to provide discovery relative to his speeding ticket.

Accordingly, Plaintiff seeks redress pursuant to 42 U.S.C. Sec. 1983 (hereinafter "Section 1983").

Section 1983 provides a cause of action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States" by any person acting under "color of any statute, ordinance, regulation, custom, or usage, or any State or Territory." 42 U.S.C. Section 1983.

Section 1983 is not itself a source of substantive rights. Rather, it merely provides the method for vindicating Federal rights elsewhere conferred. *See Albright v. Oliver*, 510 U.S. 266 (1994).

Thus, to sustain a successful Section 1983 claim, Plaintiff must prove he has been deprived of a Federal right, and the person or entity that deprived him of that right acted under "color of law".

Significantly, qualified immunity base on "good faith" is an affirmative defense to Section 1983 claims against public officials. *See Plummer v. Department of Corrections*, 305 N.J.Super. 365, 370 (App. Div. 1997) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)).

This immunity is available to public officials performing discretionary functions and protects "all but the plainly incompetent or those who knowingly violate the law". *Id.* (referring to *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Although the provision of discovery is mandated by Rules of Court, the administrative manner in which such discovery is provided must logically involve the use of discretion. Mr. Gianos and Mr. Rylak are both private practicing attorneys and municipal prosecutors.

In order to perform these roles simultaneously, they needed to develop a method for compiling, copying and providing discovery that would allow for compliance with the new Jersey Court Rules, yet minimize the burden on the time and finances of their private practice. Accordingly, it was within their discretion to adopt the commonly used administrative fee as a way to balance these interests. (*See* Exhibit F).

Mr. Rubin was also acting in a discretionary manner when he chose not to take action against Mr. Gianos and Mr. Rylak.

Plaintiff informed him Mr. Gianos and Mr. Rylak were engaging in an allegedly inappropriate practice. However, being aware that this dispute was a municipal matter, Mr. Rubin exercised his supervisory discretion in directing Plaintiff to the Frenchtown Municipal Court and Offices of the Municipal Prosecutor.

Public officials acting in a discretionary role are thus generally "shielded from liability under Section 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

A "clearly established right" is one where the contours are sufficiently clear so that a reasonable official would understand when his actions violate that right. *See id.*

Accordingly, a public official will be immune from a Section 1983 suit if his/her conduct was justified by objectively reasonable beliefs. *See id.*

In addition, the United States Supreme Court held in *Gomez v. Toledo*, 446 U.S. 635 (1980):

> "[it is] the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with a good faith belief, that affords a basis for qualified immunity of [public officials] for acts performed in the course of official conduct. *The test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether the official was acting sincerely and with a belief he was doing right.*" *Id.* at 641. (emphasis added).

Therefore, a public official's subjective belief is also an appropriate consideration in determining whether immunity applies.

This subjective belief may be based on state or local law, advice of counsel, *administrative practice*, or some other factor of which the official alone is aware. *See id.*

In the present matter, Mr. Gianos, Mr. Rylak, and Mr. Rubin each qualify for the good faith immunity available to public officials, insulating them from the current Section 1983 claims.[2]

They each acted objectively reasonable and with subjective good faith while carrying out their respective duties.

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[2] In *Point II*, the immunity of Defendants Rylak, Gianos and Mr. Rubin is explained. The immunity of Judge Martin will be discussed in *Point III*, infra.

MR. GIANOS AND MR. RYLAK

Mr. Gianos and Mr. Rylak demanded a discovery fee from Plaintiff with the understanding it was a reasonable and permissible practice under State procedural laws governing municipal practice. This understanding was based on their knowledge and perception of New Jersey Court Rules and the practice of other local municipal prosecutors. (*See* Exhibit F).

Specifically, Mr. Gianos and Mr. Rylak, in part, took guidance from New Jersey Court Rule 7:7-7(b), which as discussed in *Point I, supra*, governs municipal practice discovery and provides: "a defendant is entitled to discovery in all cases involving a consequence of magnitude or when ordered by the court." *R.* 7:7-7(b). (*See* Exhibit F.)

There is no provision in the Rules that directly addresses the imposition of discovery fees. The relevant New jersey Court Rule merely provides the defendant "shall be allowed to inspect, copy, and photograph or be provided with copies and any relevant reports . . . *within the custody of the prosecuting attorney*." *R.* 7:7-7(b). (emphasis added).

As also discussed in *Point I, supra*, it is implicit that discovery relevant to a municipal prosecution will be in the possession of municipal prosecutors, who are almost always local practicing attorneys. Therefore it is logical the cost associated with providing this discovery is going to be borne by these attorneys.

Accordingly, Mr. Gianos and Mr. Rylak believed they were entitled to reimbursement of the expenses borne by their office. Further evidencing this belief was Mr. Gianos

and Mr. Rylak's reliance on their personal knowledge that numerous similarly situated prosecutors charge an equivalent or greater fee. (*See* Exhibit F).

Finally, this practice was specifically noted to exist by the New Jersey Appellate Division in *State v. Green*, 327 N.J. Super. 334 (App. Div. 2000). The Court stated: "[W]e have a sense that the heart of the contention, the $25 administrative fee, may be the rule rather than the exception." (*See* Exhibit G at page 342).

Clearly, therefore, it was objectively reasonable based on the nature of local practice and New Jersey procedural law for Mr. Gianos and Mr. Rylak to charge a nominal fee for providing discovery.

Moreover, in good faith both Mr. Gianos and Mr. Rylak subjectively believed they were entitled to reimbursement of the expenses borne by their office in making discovery available to Plaintiff. (*See* Exhibit F).

MR. RUBIN

As Hunterdon County Prosecutor, the claims against Mr. Rubin are derivative of those against Mr. Gianos and Mr. Rylak.

Moreover, Mr. Rubin never had any direct contact with Plaintiff. Plaintiff contacted Mr. Rubin's office by telephone and was informed, through Mr. Rubin's secretary, that he should direct his complaint to either Frenchtown Municipal Court or the Offices of the Municipal Prosecutor, which is where the discovery dispute would be resolved.

Finally, the March 5, 1997 letter Plaintiff sent to Mr. Rubin complaining of the Prosecutors' actions in no way discredits Mr. Rubin's good faith belief the fee request was appropriate. (*See* Exhibit L).

There simply is no evidence whatsoever that Mr. Rubin's response in this matter was not objectively reasonable and premised on the subjective good faith belief Plaintiff's dispute was a municipal matter.

Accordingly, Mr. Gianos, Mr. Rylak, and Mr. Rubin are each entitled to qualified immunity under Federal law.

B. STATE LAW

In Plaintiff's Complaint, he invoked the Court's jurisdiction to consider claims arising under State law. (*See* Exhibit E). Although it is unclear whether this invocation was in regard to all claims asserted, Defendants are also entitled to immunity under New Jersey law.

Under the Tort Claims Act, *N.J.S.A.* 59:1-1, *et seq.*, a public employee is afforded immunity if he acts in good faith in the execution or enforcement of any law. *See N.J.S.A.* 59:3-3.

In order to meet this "good faith" standard, a public employee's actions must be objectively reasonable or performed with subjective good faith. *See Canico v. Hurtado*, 144 N.J. 361 (1996).

As discussed above in reference to Federal immunity, the actions of Mr. Gianos, Mr. Rylak, and Mr. Rubin were both objectively reasonable and exercised with subjective good faith.

Accordingly, the affirmative defense of qualified immunity is equally warranted under New Jersey law.

POINT III

JUDGE MARTIN IS ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY FROM LIABILITY AS ESTABLISHED BY THE THIRD CIRCUIT COURT OF APPEALS.

Well-established law dictates judges are absolutely immune from liability for their judicial acts. *See K.D. v. Bozarth*, 313 N.J.Super. 561, 568 (App. Div. 1998).

"[T]he doctrine of judicial immunity is justified by strong public policy which recognizes that the independence . . . of the judiciary might be compromised if judges are exposed to threats of civil liability for actions taken in their judicial capacity." *Figueroa v. Blackburn*, 39 F.Supp.2d 479, 485 (D.N.J. 1999); *see also Antoine v. Byers & Anderson*, 508 U.S. 429, 435 (1993).

It is also "well settled that judicial immunity applies to Section 1983 actions", and applies "even as to judicial acts that are wrong, malicious, or beyond the judge's authority." *Id.*; *see also Pierson v. J.L. Ray*, 386 U.S. 547, 553-54 (1967); *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); and *Stump v. Sparkman*, 435 U.S. 349 (1978).

Judicial immunity has two prerequisites: (1) the act complained of must be a judicial act; and (2) the judge must have subject matter jurisdiction at the time he acts. *See K.D.*, 313 N.J.Super. at 568.

A "judicial act" is an act normally performed by a judge in his judicial capacity. *See id.* In the present case, it is clear that addressing a procedural dispute such as the

method for providing discovery is a normal function performed by a judge.

Thus, for purposes of the present case, the important inquiry is whether Judge Martin had subject matter jurisdiction at the time he intervened.

New Jersey Municipal Courts are clearly courts of limited jurisdiction. *See Figueroa*, 39 F.Supp.2d at 489. However, whether a judge has subject matter jurisdiction must be broadly construed in the immunity context, such that immunity will only be denied where the judge acted in the clear absence of all jurisdiction. *See K.D.*, 313 N.J.Super. at 568.

Furthermore, United States Magistrate Judge Freda L. Wolfson held in *Figueroa* that "application of the absolute judicial immunity standard to a court of limited jurisdiction is appropriate." *Figueroa*, 39 F.Supp.2d at 490.

In *Figueroa*, a municipal court judge was sued for entering a Contempt of Court Order against an individual who was being arraigned on harassment charges. The plaintiff filed a civil rights complaint alleging the judge failed to provide him with an automatic five-day stay of his sentence as provided by New Jersey Court Rules preventing him from filing an immediate appeal of his prison sentence. *See id.* at 481-83.

Judge Wolfson granted summary judgment in favor of the municipal judge because the municipal judge was acting in a judicial capacity when holding the plaintiff in contempt, and as explained above, the doctrine of immunity applies to courts of both limited and general jurisdiction. *See id.* at 495.

This decision was affirmed by the Third Circuit Court of Appeals in *Figueroa v. Blackburn*, 208 F.3d 435 (3rd Cir. 2000).

The Court held that judges of courts of limited jurisdiction, such as New Jersey municipal court judges, are entitled to absolute judicial immunity because "it is clear the role of [such a judge] is functionally comparable to that of a judge of a court of general jurisdiction." *Id.* at 442.

In the instant case, it is clear Judge Martin was: (a) acting in his judicial capacity when considering the discovery dispute; and (b) had subject matter jurisdiction over Plaintiff's Municipal Court Summons.

Moreover, Judge Martin did not make any decision concerning whether the State's evidence was properly in the possession of Mr. Gianos and Mr. Rylak. There was no need for Judge Martin to address this issue because, as discussed in *Point I, supra*, the Court Rules expressly provide discovery will be in the possession of the prosecuting attorney(s).

As also discussed in *Point I, supra*, it is therefore implicit that discovery relevant to a municipal prosecution will be in the possession of municipal prosecutors, who in this case, as in most municipalities, are local practicing attorneys.

Accordingly, Judge Martin is entitled to absolute judicial immunity from liability for his "judicial acts" regarding the discovery fee dispute in this matter.

POINT IV

PLAINTIFF CANNOT MAKE THE FACTUAL SHOWING REQUIRED TO SUPPORT HIS BARE ALLEGATION MR. GIANOS AND MR. RYLAK ARE LIABLE FOR MALICIOUS PROSECUTION.

To state a claim for malicious prosecution under Section 1983, Plaintiff must satisfy the elements of a state law malicious prosecution action. *See Cooper v. Smith*, 936 F.Supp. 515 (1996); *Russell v. Smith*, 68 F.3d 33 (1995); and *Treece v. Village of Naperville*, 903 F.Supp. 1251 (1995).

Plaintiff in a malicious prosecution action under New Jersey law must prove the original action complained of was: (1) brought without probable cause; (2) actuated by malice; (3) terminated favorably to the plaintiff; and (4) Plaintiff suffered a special grievance. *See LoBiondo v. Schwartz*, 323 N.J.Super. 391, 423 (1999).

In the present matter, Plaintiff alleges Mr. Gianos and Mr. Rylak are guilty of malicious prosecution/use of process.

However, this bare allegation is not supported by any facts adduced. First, there was probable cause as a matter of law, and in fact, for Plaintiff to be issued a speeding ticket on January 14, 1997. Second, there are no facts adduced which support Plaintiff's allegation Mr. Gianos and Mr. Rylak acted with malice or intent.

A. EXISTENCE OF PROBABLE CAUSE

Plaintiff was allegedly driving through a twenty-five (25) mile per hour school zone at a clocked speed of fifty

one (51) miles per hour. However, as discussed in the January 19, 2000 Appellate Division decision, the statute establishing this twenty-five mile per hour zone indicates this speed limit is only applicable "during recess, when the presence of children is clearly visible from the roadway, or while children are going to or leaving school during opening or closing hours . . . " (*See* Exhibit G at page 338).

The Appellate Court found it was not established beyond a reasonable doubt that school children were in motion at the time Plaintiff was stopped. The officer testified his patrol car was stationed directly across from school at the time of the stop because school ordinarily let out at that time.

Since the officer could not testify he had actually witnessed children present, the court held the State failed to establish beyond a reasonable doubt Plaintiff was subject to the twenty-five mile per hour speed limit. (*See* Exhibit G at pages 338-339).

Nevertheless, Plaintiff was clocked at a speed of fifty-one miles per hour on the residential road of Harrison Street, Borough of Frenchtown, New Jersey, in front of an elementary school. (*See* Exhibit G at page 337). Thus, regardless of whether the twenty-five mile per hour speed limit was applicable at the time, Plaintiff's speed exceeded that which is otherwise permitted on this residential road[3]. Accordingly, there was probable cause as a matter of law for the officer to stop Plaintiff.

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[3] According to the Clerk at Frenchtown Borough Hall, the speed limit on Harrison Street is always 25 miles per hour, and is 15 miles

(Continued on following page)

In addition, the appropriate inquiry in determining whether probable cause existed in fact for Plaintiff's speeding ticket is whether a reasonable officer could have believed there was probable cause in light of the information in the officer's possession. *See Berg v. County of Allegheny*, 219 F.3d 261, 272 (3rd Cir. 2000).

A reasonable officer, based on his experience of parking across from a school every day to ensure the safety of entering or exiting children, would have believed the twenty-five mile per hour speed limit was applicable.

Therefore, the officer who issued Plaintiff's speeding ticket had probable cause to do so, even if it was not established beyond a reasonable doubt that children were actually present.

B. ABSENCE OF MALICE OR INTENT

The facts adduced do not support Plaintiff's bare allegation Mr. Gianos and Mr. Rylak acted with malice or intent to deprive him of due process rights. To the contrary, the evidence clearly indicates Mr. Gianos and Mr. Rylak made every effort, short of waiving the disputed fee, to make discovery available to Plaintiff.

Accordingly, Mr. Gianos and Mr. Rylak are entitled to judgment as a matter of law.

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per hour when the school zone limit is applicable. Although this slightly differs from the Appellate Division's description of the school zone speed limit, it clearly indicates the permissible speed on Harrison Street is no greater than fifty (50) miles per hour.

POINT V

SINCE MR. GIANOS AND MR. RYLAK ARE NOT LIABLE FOR THEIR ALLEGED WRONGFUL ACTIONS, THE LAW FIRM OF RYLAK & GIANOS, AS A PARTNERSHIP, CANNOT BE LIABLE AND IS ENTITLED TO SUMMARY JUDGMENT.

Regarding partnerships, *N.J.S.A.* 42:1-13 provides "where, by any wrongful act . . . of any partner acting in the course of the business of the partnership . . . loss or injury is caused to any person, the partnership is liable therefor to the same extent as the partner so acting". *N.J.S.A.* 42:1-13; *see also Eule v. Eule Motor Sales*, 34 N.J. 537, 542 (1961).

The Law Firm of Rylak & Gianos is a partnership, of which Mr. Gianos and Mr. Rylak are partners. (*See* Exhibit F).

Mr. Gianos and Mr. Rylak, in part, were acting in the course of their partnership's business when they sought a discovery fee from Plaintiff as a means to reimburse the anticipated cost to their firm of obtaining such discovery.

In *Point II* and *Point IV, supra*, it was explained that Mr. Gianos and Mr. Rylak are not liable for any wrongful act. Accordingly, the Law Firm of Rylak & Gianos cannot be liable and is entitled to judgment as a matter of law.

POINT VI

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS.

Federal Rule of Civil Procedure 56 provides a court should enter summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* F.R.C.P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party has satisfied this initial burden, the opposing party must establish that a genuine issue exists. *See Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3rd Cir. 1985), cert. denied, 475 U.S. 1013 (1986).

However, not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Furthermore, the opposing party cannot rest upon mere allegations; it must present actual evidence that creates a genuine issue of material fact. *See id.* at 249 (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

The court must draw all reasonable inferences in the opposing party's favor, and must accept the party's evidence when considering the merits of the summary judgment motion. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3rd Cir. 1986).

Accordingly, it is respectfully submitted that in consideration of all the material evidence, Defendants are entitled to judgment as a matter of law.

CONCLUSION

Based on the foregoing, it is respectfully requested the Court enter an Order granting summary judgment and dismissing any and all claims against each Defendant with prejudice.

Respectfully submitted,
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DATED: March 22, 2001